Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime.	)	CC Docket No. 01-92
	)	
	)	
	)	

COMMENTS OF THE EARLY ADOPTER STATE COMMISSIONS:

Maine Public Utilities Commission;

Nebraska Public Service Commission;

Vermont Department of Public Service; and

Vermont Public Service Board

October 25, 2006

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I. INTRODUCTION

In response to the Federal Communications Commission's (Commission) Public Notice[1] released July 25, 2006 in the above-captioned matter, the Maine Public Utilities Commission; Nebraska Public Service Commission ("NPSC"); Vermont Department of Public Service; and Vermont Public Service Board ("Early Adopter States"), hereby submit the following joint comments.

The Commission seeks comment on an intercarrier compensation reform plan (the "Missoula Plan") filed July 24, 2006. The Missoula Plan is the product of a 2-year

[1] *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, Public Notice, CC Docket No. 01-92, DA 06-1510 (WCB July 25, 2006). *See* Fed. Reg. 45510. The Commission thereafter extended the public comment period to October 25, 2006. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Order (WCB August 29, 2006).

process of industry negotiations facilitated by the National Association of Regulatory Utility Commissioners (NARUC). Supporters of the Missoula Plan listed included AT&T, BellSouth Corp., Cingular Wireless, Global Crossing, Level 3 Communications and various members of the Rural Alliance.

The Missoula Plan contained an "Early Adopter" fund proposal, but the details were not fully developed. The proponents committed:

> resources to work with State Commissioners to help size the Early Adopter Fund and to determine how that Fund should work when States have rebalanced access rates through State funds, local rate increases, and/or new line items.[2]

The proponents also committed:

> resources to work with State Commissioners to evaluate how Plan mechanisms involving acquisitions can be used to encourage carriers to invest in rural areas.[3]

With these commitments in mind, the Early Adopter States and some other states have held discussions with the Missoula Plan proponents. Face-to-face meetings have been held in Washington, D.C. and Indianapolis, and we have also conducted conference calls. The discussions are continuing on a regular basis, and considerable policy and financial work is being done. We believe that we have made significant progress towards resolving the early adopter issues. We have made less progress with regard to the rural/nonrural company issues, but it has always been understood that these discussions are on a slower time track.

[2] Missoula Plan at 12, n.9.

[3] Missoula Plan at 13, n.10.

If and when we resolve these early adopter issues and rural/nonrural issues, we will file documents in this docket summarizing that progress.[4]

II. COMMENTS

The Missoula Plan was developed by the industry in a forum facilitated by the NARUC Task Force on Intercarrier Compensation (NARUC Task Force). While we may disagree with several of the components of the Missoula Plan, the overall process was productive. Our comments below raise issues important to early adopter states.

The Early Adopter States acknowledge that the current intercarrier compensation system is broken, and reform is necessary. In some areas of the country local exchange carriers continue to charge for access at historical per-minute rates that were established twenty years ago or more. These local exchange carriers, some of whom have unregulated rates, are effectively exporting much of the cost of providing local telephone service to network users in other areas. This system cannot survive indefinitely, particularly in light of the increasing bypass by inter-modal competitors, including VoIP service provided over increasingly available broadband connections.

The Early Adopter States have a number of concerns about the Missoula Plan. We are concerned, for example, that the plan does not satisfy all of the goals established in the NARUC principles. However, in these initial comments we limit ourselves to three topics. First, we comment on the amount of money proposed for the

[4] The Missoula Plan provides if discussions between proponents and Early Adopter States produce revisions to the Missoula Plan, both will "support the entire Plan as amended." *See* Missoula Plan at 76, n.27. The Nebraska PSC has been and is willing to continue to work out acceptable amendments to the Missoula Plan recovery mechanism components with Missoula Plan sponsors, but the NPSC believes that the requirement that the state commission support the entire Plan is exorbitant.

Early Adopter provision and observe that the plan's Early Adopter provisions are too vague at this point to make meaningful comment possible. Second, we comment on the importance of including rate rebalancing in the plan's provisions and on ameliorating the plan's harmful effects on rural customers of large carriers. Finally, we observe that the plan's preemption mechanisms create unnecessary legal risk.

A. The Amount of Money Set Aside in the Early Adopter Fund Is Insufficient.

The 1996 Act contained several important universal service goals. Not least, the Act mandated that the rates consumers pay for telephone service be reasonably comparable between rural and nonrural areas. However, the Act also required that federal universal service support be explicit;[5] and in that spirit several states have acted to reduce their intrastate access rates to levels more commensurate with costs.[6] Any federal mandate for intrastate access reform must respect both of these goals by including an adequate Early Adopter mechanism.

The Act also anticipated that states would supplement these federal mechanisms and goals. Consistent with that intent, some states have already eliminated much or all of existing implicit subsidies within their intrastate rate designs. States that have substantially decreased their intrastate access rates have also taken a variety of concurrent actions. Some allowed carriers to recover the lost revenue costs through local rate increases or specific line item charges. Other states established new state universal service fund mechanisms. Regardless of how the price was paid, however,

[5] 47 U.S.C. § 254(e); *see also Qwest v. FCC*, 398 F.3d 1222, 1232 (10th Cir. 2005) (states not mandated to remove implicit subsidies).
[6] In some states the action was mandated by legislation. In others, it was accomplished solely through regulatory action.

consumers in early adopter states have paid the full price of these state access reforms, and they have not always seen matching toll rate decreases.

In 1999, the NPSC established an explicit state universal service fund (the NUSF) to finance access reform. At the time, the average company in Nebraska lost an average of $5.00 per-line per month in access revenues. The Commission gave nonrural carriers three years to reduce access charges to interstate levels. Rural carriers were also required to substantially reduce access charges over a period of four years.

Lost access revenues were replaced by state universal service support generated from an explicit charge on consumers' bills and through increased local rates in some areas of the state. After a thorough investigation, the NPSC established a local rate benchmark of $17.50 for single line residential service. The NPSC determined that $17.50 was the appropriate measure of cost for providing local service. Companies were required to raise local rates to the benchmark in order to qualify for state universal service funding. Today the NUSF distributes $72 million per year to Nebraska carriers.

In 1997, acting pursuant to legislative mandate, the Maine Commission rebalanced in almost the same manner as Nebraska. Maine established a local rate benchmark of $19.30, and reduced access rates by an amount that converts to approximately $10.00 per line per month. Today the Maine USF distributes $8 million per year to Maine carriers.

Under the Missoula plan, states that have not taken early action to reduce rates will be forced to reduce intrastate access charges for originating and terminating traffic.

The lost revenue will be largely replaced by Recovery Mechanism (RM) funds derived from all states, including those that continue to pay for their own lower access charges. This creates inequality between states that have already reduced access, who paid the price internally, and states that have not reduced access, who will share much of the cost nationally.

The Early Adopter mechanism included in the Missoula Plan was intended to maintain rough equity between these two classes of states. For this reason, the Missoula Plan or any similar access charge reform plan cannot be implemented fairly in all parts of the country without a well designed and adequately funded Early Adopter mechanism. Inadequate funding would require ratepayers in Early Adopter states to continue funding lower access rates in their own states, plus a portion of the costs of preemptive rate reductions in other states.

The Missoula Plan calls for

> at least $200 million or whatever greater amount it determines to be an appropriate percentage of State access reduction funds that should be covered by the Early Adopter Fund."[7]

This figure is substantially less than the total of estimated early adopter claims. Our preliminary data collection has identified several states with early action on access reductions in the range of $8 to $10 per line per month. Still others have reduced access by $3 to $5 per line per month. This suggests that the nationwide total of first-adopter claims could reach $2 billion per year. While the Early Adopter States do not assert that the Early Adopter Fund needs to be $2 billion, the Missoula Plan's estimate

[7] Missoula Plan at 76.

is too low. An increase to the Early Adopter Fund should be offset by other means such that there would not need to be a significant increase in the total size of the Restructure Mechanism. The Early Adopter States intend to continue working with the Missoula Plan proponents to estimate more accurately the amount of funding that is needed.

B. The Provisions of the Early Adopter Fund Are Not Described In Sufficient Detail To Allow Meaningful Comment.

The Early Adopter Fund is described in two paragraphs in the Missoula Plan. However, important aspects of the Fund are not operationalized. The drafters admit the plan "does not address the schedule for implementation" of the Early Adopter Fund.[8] There is a commitment to work briefly with the states that have enacted reform measures and then file an amendment to the plan as long as the state commissions pledge to support the entire plan as amended.

As noted above, the Early Adopter States have actively participated in meetings with the sponsors in order to provide more meaningful detail in the Missoula Plan. Also as noted above, however, we believe that a well-designed and adequately funded Early Adopter Fund is essential to the success of the Missoula Plan. Yet the Plan's early adopter provisions are so vague that it is not possible at this time to offer meaningful comment.

Most important, the plan makes virtually no mention of how Early Adopter Fund monies would be calculated, how they would be distributed or how the monies would be used. In addition, it is not clear whether Early Adopter Fund monies would continue to

[8] Missoula Plan at 76, n.26.

be disbursed for as long as RM funds are distributed. Nor is it clear whether there would be a nationwide cap.

The Plan does require that states "agree to use the Early Adopter Fund dollars to lower the State line item for its explicit state funding mechanism."[9] To be sure, the Early Adopter States would prefer to have some discretion to disburse Early Adopter Fund monies in the manner most beneficial to consumers. This discretion is important because states have chosen to replace access revenues in quite different ways. Moreover, the state commissions have uniquely detailed knowledge pertaining to their high-cost areas, access rates, the relative earnings of eligible telecommunications carriers, and affordability in their states.

C. The Plan Should Include a Rate Rebalancing Mechanism

The Missoula Plan includes revenue replacement rules, notably through substantial SLC increases. Those increases, however, do not depend upon the level of the local service rates already paid by customers. Under the plan, customers with high rates would be required to pay the same SLC increases as customers with low rates.

In addition, a substantial portion of the lost intercarrier revenue will be replaced by the Recovery Mechanism. That mechanism requires equal contributions from low-rate and high-rate customers. Therefore a substantial portion of RM funds will be raised from customers with high rates to replace access revenue losses by companies charging low rates.

[9] Missoula Plan at 77.

The Missoula Plan does not take this inequality into consideration. A plan that requires high-rate customers to contribute to access replacement funding in low-rate areas is unfair to customers in many states and is not tied to any legitimate government purpose.

These inequalities are substantial and important to the ratepayers in the Early Adopter States. As part of access reform, the Nebraska PSC raised its local rates to $17.50. The Maine PUC raised local rates in Maine to $19.30. Yet other states have local rates as low as $6.00.

A better approach would be to add a rate benchmarking mechanism to the Missoula Plan. This would treat consumers fairly, and it would create an incentive for states to rebalance rates if they are continuing to support low local subscriber rates with high per-minute access rates.

D. The Plan Exacerbates Existing Discrimination Against the Rural Customers of Large Carriers

Under the Missoula Plan, the Subscriber Line Charge cap will be capped at $10.00 for customers of nonrural companies and $8.75 for customers of rural companies. Moreover, the plan allows for deaveraging of SLCs. This will allow nonrural carriers to raise SLCs to $10.00 in rural areas and leave them below the cap in areas where they face competition. The result is likely to be $10.00 SLCs in rural areas served by large companies, and lower rates in urban areas and in areas served by small companies. This discrimination is not justified under the principles of section 254(b), and it amounts to explicit and *de facto* discrimination against rural areas served by nonrural carriers where competition may be least likely to occur.

The distinction between a “rural customer” and a “rural company” is particularly important to some of the Early Adopter States. In some states the percentage of the population classified as rural is virtually the same as the percentage of lines served by small “rural” telephone companies. Many Midwestern and high-population states fall in this group. However, several rural states are predominantly served by large so-called “nonrural” carriers. For a score of these states, the policy equation between “rural customer” and “rural company” is grossly inaccurate. The following table shows the four most extreme cases.

State	% of Rural Customers (per U.S. Census)	% of Lines Served by Small “Rural” Carriers
Maine	60%	16%
Mississippi	51%	4%
Vermont	62%	13%
Wyoming	35%	14%

Rural customers in these same rural states are already disadvantaged by the FCC’s existing universal service policies. The FCC provides only $0.19 per line per month of universal service support to the customers of nonrural companies, while it provides $10.06, or fifty times as much, for the average customer of small rural companies. Therefore the rural customers of large companies are already substantially disadvantaged by existing FCC policies. To tell these customers that they must also pay larger SLCs would exacerbate this existing discrimination.

In their present form, the Missoula Plan provisions regarding SLCs are not acceptable because they discriminate against millions of rural customers. The Missoula Plan cannot succeed if it further disadvantages the rural customers of large carriers who are forced to pay high rates. The Commission should either adopt some form of local rate benchmarking or establish uniform SLC caps for all three carrier Tracks.

The Early Adopter States and the Missoula Plan proponents are continuing to work on other proposals that might enhance investment in rural areas and reduce discrimination against rural customers of large carriers. These include:

- Adjusting or removing the cap on Safety Valve support to anticipate the possibility that many more lines may be sold by nonrural companies than had originally been anticipated in 2001 when the cap was created.
- Allowing acquired exchanges to be merged into the acquiring carriers' study area, as opposed to being established as essentially a new study area.
- Allowing nonrural carriers with very high percentages of rural customers to divide their study areas, thereby creating a rural and a nonrural study area in the same state.

E. Preemption Provisions In the Plan Create Unnecessary Risk

The Missoula Plan provides for sweeping preemption of state authority over access rates. For example, the plan states

> The FCC will need to adopt *assertive new legal strategies* to implement those provisions and, in particular, to establish uniform rates for all

> traffic terminated by carriers in those Tracks, including traffic traditionally characterized as 'local' and 'intrastate access.'[10]

The Missoula Plan proponents are correct to propose change, but a desirable goal cannot justify overlooking the law. Several commenters have already asserted in this proceeding that the 1996 Act preserves the authority of states to determine intrastate access rates. Others have expressed doubt that other legal theories, such as the "impossibility" exception, or creative readings of sections 251 and 252 can be stretched to preempt a state from regulating these rates for switched communications originating and terminating within its own borders. It is a clearly established law that an agency cannot confer power on itself, particularly where there is Congressional limitation.[11]

Even if it is ultimately unsuccessful, a legal challenge can create significant uncertainty within the industry for years, inhibiting investment as the case winds its way through various federal appellate courts. This uncertainty could well undermine many of the Missoula Plan's positive attributes.

Given this substantial uncertainty, the Commission should seek methods of addressing access reform in ways that are less likely to produce legal challenges and uncertainty. Access reform should remain a joint state and federal enterprise, and states can legitimately be expected to generate some of the revenue necessary to implement a reform plan. A better course than preemption would be to provide financial incentives for states to enact regulations or policies that align with federal policy. If it

[10] Missoula Plan, Policy and Legal Overview at 5 (italics added).

[11] See *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-375 (1986).

worked cooperatively with state commissions, the Commission could achieve the goal of rate unification within the limits of existing federal and state authority.

III. CONCLUSION

The Missoula Plan contains many positive elements. However, it has flaws as well. The Early Adopter States are pleased to have the cooperation of the Missoula Plan proponents in trying to improve the plan.

As we continue to meet with the proponents, we will seek to provide more specific proposals regarding Early Adopter funding, even though we recognize that the initial estimate of $200 million may not be adequate. We are working on a plan for rate rebalancing that would condition SLC increases and federal support based upon the level of local rates. Finally, we are seeking, albeit on a longer timetable, mechanisms that would treat rural customers fairly, without regard to whether they are served by large or small carriers.

Although these modifications would not eliminate the preemptive nature of the Missoula Plan, we hope that, with sufficient modification, they will make the plan sufficiently acceptable to the states to minimize the legal risks created by the original plan.

Respectfully Submitted, October 25, 2006.

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